# THE RECORD
# OF THE ASSOCIATION OF THE BAR
# OF THE CITY OF NEW YORK

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## Association Activities

AT THE ANNUAL MEETING of the Association, held on May 13, the following officers and members of committees were elected:

PRESIDENT

Bethuel M. Webster

VICE PRESIDENTS

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John B. Marsh

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Lloyd K. Garrison — Alexander Donald MacKinnon
Lewis M. Isaacs, Jr. — Dean K. Worcester

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*Class of 1955*

N. Philip Bastedo — John V. Lindsay
Henry C. Blackiston, Jr. — Harold R. Medina, Jr.
Edwin S. Cohen — Edward Abbe Niles
Caesar Nobiletti

COMMITTEE ON AUDIT

Dana C. Backus — Chauncey B. Garver
Sigourney Butler Olney

At the meeting the Association voted to oppose Senate Joint Resolution 130 introduced by Senator Bricker which would amend the Constitution by drastically altering present treaty-making procedures. Dana C. Backus, Chairman of the Committee on International Law, and Theodore Pearson, Chairman of the Committee on Federal Legislation, reported that their Committees unanimously disapproved the amendment. The meeting also endorsed the Lodge Bill permitting lawyers to qualify for coverage under the Federal Old-age and Survivors Insurance System. A report by the Committee on International Law and the Committee on Foreign Law, of which Dudley B. Bonsal is Chairman, on the protection of American investments abroad was also approved. The report urged the establishment of an international commission to protect individual holders of private property abroad.

Interim reports were received from the Chairman of the Committee on the Judiciary, Louis M. Loeb, the Committee on Grievances, John B. Marsh, Chairman, and the Committee on Increase

of Membership, Edward Abbe Niles, Chairman. Amendments to the By-laws were adopted which affect the jurisdiction of several of the Association's committees.

HIS HONOR the Mayor of the City of New York was the guest of the Association at a Municipal Affairs Evening held on May 20 under the sponsorship of the Committee on Municipal Affairs, W. Mason Smith, Jr., Chairman. In addition to the Mayor, the following city officials were present: Abraham D. Beame, Assistant Director of the Budget; William E. Boyland, President, Tax Department; Barbara Carroll, Assistant Corporation Counsel; Edward F. Cavanagh, Jr., Commissioner, Department of Marine and Aviation; Frank J. Connaughton, First Deputy Commissioner and Director of Commerce, Department of Commerce; Victor J. Herwitz, Assistant Corporation Counsel, Division of General Litigation; Denis M. Hurley, Corporation Counsel; Daniel Kornblum, Director, Office of the Mayor, Division of Labor Relations; Edward T. McCaffrey, Commissioner of Licenses; John J. McCloskey, Sheriff, City of New York; John F. Mahoney, Commissioner of Health; Anthony Masciarelli, Commissioner of Markets; George P. Monaghan, Police Commissioner; Andrew W. Mulrain, Commissioner of Sanitation; Harris H. Murdock, Chairman, Board of Standards and Appeals; Lewis Orgel, City Register; W. Bernard Richland, Assistant Corporation Counsel, Division of Opinions and Legislation; and James H. Sheils, Commissioner of Investigation. A buffet supper preceded a well attended meeting, which was addressed by the Mayor, the President of the City Council, and the Comptroller of the City of New York.

THE HEARINGS on the Reed-Keogh Bills were held on May 13 and 14. The Association's Special Committee on Tax Problems of the Professions, Roswell Magill, Chairman, in cooperation with committees from the New York State Bar Association and the

American Bar Association, arranged to have some twenty organizations present at the hearings to testify in favor of the proposed legislation.

THE COMMITTEE on Real Property Law, Lewis M. Isaacs, Jr., Chairman, has reviewed the form of lease approved some years ago by the Association. The Committee has concluded that the lease is useable today in its present form, that none of its provisions are obsolete, overruled by case or statutory law, or offensive to public policy. The Committee concludes that the lease is a model of good draftsmanship and is written in a clear, simple style. The lease is available at most stationery stores.

THREE MEMBERS of the Association have recently published law books which have received favorable attention. Henry Cohen and Arthur Karger are the authors of "Powers of the New York Court of Appeals." Samuel Spring has published "Risks and Rights in Publishing, Television, Radio, Motion Pictures, Advertising, and the Theatre."

OTTO C. SOMMERICH, a member of the Committee on Foreign Law, has called attention to an interesting ruling by an Austrian court on the subject of contingent fees. Mr. Sommerich writes:

> "In your publication, Volume 6, No. 8, November 1951, page 363, there appears an article written by me, 'The History and Development of Attorneys' Fees.' In this article I state that in most European countries, as well as England and Canada, contingent fees are prohibited.
>
> "A recent ruling (April 4, 1951) that in Austria contingent agreements are not tolerated, is the decision of the Supreme Court of the Republic of Austria (1 Ob 194/51 Oesterreichische Juristen-Zeitung No. 13, year 1951, pages 331, 332), in the case of Josef A. Haim, a member of the Bar of the State of New York against Fanny Bloch, a United States citizen.
>
> "The facts in that case are that the plaintiff, a New York attorney, entered into a contingent fee arrangement in New York for the

restitution of the defendant's property formerly owned by her in Austria. He succeeded in obtaining such restitution.

"The defendant refused to fulfill the agreement and pay the plaintiff. Plaintiff brought suit in Austria against defendant who, in the meantime, had left New York and taken her residence in Vienna. The Austrian Supreme Court held that contingent fee agreements were contrary to the law of Austria, the roots of which were traced back to ancient Roman law originating with a decree of Emperor Diocletian, and affirmed the judgment of the courts below dismissing the complaint. The court held that the agreement though valid in New York was not enforceable in Austria."

THE COMMITTEE on Legal Education, Archie O. Dawson, Chairman, is considering suggested revisions of the regulations relating to admission to the Bar proposed by a committee of law school deans. Among the more important revisions agreed to by the deans' committee are (1) removal of the requirement that all students not having approved A.B. degrees must have law qualifying certificates to be admitted to New York State law schools; (2) abolition of office study as an alternative for admission to the Bar; and (3) a revision of the requirements for night law schools to permit the completion of these courses in five years rather than in four as at present.

THE PROGRAM "For Bench and Bar" broadcast over WNYC–FM (93.9 megacycles) every Monday evening at 8:30 has been discontinued. The program consisted of rebroadcasts of twenty-one selected lectures given before the various legal sections of the Committee on Post-Admission Legal Education.

THE ART SHOW, which opened on May 1 under the auspices of the Committee on Art, Samuel A. Berger, Chairman, was a great success. Over eighty pictures were exhibited by thirty-nine members. Robert Beverly Hale, Associate Curator of American Art at

the Metropolitan Museum of Art, was consultant to the Committee, and Alan D. Marcus was Exhibit Chairman.

THE UNITED AIR LINES has arranged for a special reservation service for members of the American Bar Association who plan to attend the Annual Meeting of the Association in San Francisco on September 15–19. Members desiring reservations are asked to call John W. Littlefair, Murray Hill 2–7300.

THE FINAL MEETING of the section on Jurisprudence and Comparative Law (Post-Admission Legal Education Committee), of which the Honorable Samuel C. Coleman is chairman, was held before a capacity group on May 12. The subject was "Trial of a Law Suit" in Italy, Austria and France. The guest speakers, discussing the trial procedure in their respective countries, were Angelo Piero Sereni, Robert F. Weissenstein and Lucien R. Le Lievre.

After these three speakers, Judge Coleman summarized the views expressed and made some comparisons of workings of the courts in those countries with ours. Last year, Judge Coleman delivered a series of lectures at the University of Strasbourg, the Sorbonne, the University of Dijon and the University of Florence. These lectures dealt mainly with the origins and developments of American legal institutions, their present positions and a comparison of those institutions with those of the foreign countries. While abroad Judge Coleman observed the everyday activities of some of the courts and in addition had the benefit of exchanging views with judges, law professors and members of the Bar.

# The Calendar of the Association for June

*(As of May 15, 1952)*

June 2 Meeting of Special Committee on the study of the Administration of Laws Relating to the Family
Dinner Meeting of Committee on Federal Legislation

June 3 Dinner Meeting of Executive Committee
"On Trial"—Television Program, WJZ–TV (Channel 7), 9:30 P.M.

June 9 Meeting of Committee on Criminal Courts, Law and Procedure
Dinner Meeting of Committee on Professional Ethics

June 10 "On Trial"—Television Program, WJZ–TV (Channel 7), 9:30 P.M.

June 11 Dinner Meeting of Committee on Administrative Law

June 12 Meeting of Committee on Domestic Relations Court

June 17 Dinner Meeting of Committee on the Municipal Court
"On Trial"—Television Program, WJZ–TV (Channel 7), 9:30 P.M.

June 18 Meeting of Committee on Admissions

June 23 *Adjourned Annual Meeting of Association, 4:45 P.M.*

June 24 Dinner Meeting of Committee on Broadcasting
"On Trial"—Television Program, WJ–TV (Channel 7), 9:30 P.M.

# The President's Letter

*To the Members of the Association:*

A departing President, like a guest, should not stand uncertainly at the door, fiddling with his hat. He should make his manners and move on. And so I should like to express my profound thanks to the members and to the splendid staff of the Association for two years which I shall always treasure: thanks for their cooperation and the heady joys of professional comradeship, thanks for the opportunity to observe closely and applaud the infinite variety of their disinterested service to the Association, the profession and the public, and, finally, thanks for the inspiration of their obvious loyalty to the great traditions of the Association. I shall resist the self-indulgence of praising my successor, Bethuel Webster, for any attempt at advance billing would fail to do justice to his great abilities and to the muscular leadership which he will provide.

Presidents are almost as transient as migratory birds when compared with Treasurers. Good Treasurers are so rare that they are natural subjects for permanent captivity. We almost did that to Chauncey Garver but he had earned time off for good behavior. For eight years he did an outstanding job, seeing the Association through what might have been dangerous financial rapids during the great remodeling program of the Tweed administration and into the present relative financial placidity of solvency without crushing debt. And he kept his worries largely to himself, just as he now does the reserves and surpluses. No chameleon he, his comforting character was unchanged whether the background was red or black. I am sure that he will now enjoy sitting back and watching, with his little sardonic smile, the efforts of his fine successor, George Spiegelberg, to keep up his good work.

Before the crack in the door disappears, perhaps I may be allowed to note a few ultimate lessons which I learned during my

term and which might be of some future use. First, I am satisfied that the Association has a large reservoir of respect and good will with the press and in other quarters which can be drawn on for support of our positions in such fields as legislative and judicial reform, much more effectively than we have been doing. This reservoir has been filled through years of courageous and public-spirited activity of the Association. The spigot can be turned by finding better ways to make our positions and our reasons understandable enough so that they can be expounded by and will command the support of laymen. Second, I believe that we could greatly strengthen and broaden support for our program by taking the trouble to vouch in other disinterested groups. Only very rudimentary steps in both these directions have been taken. Finally, a truism which bears repetition, all the agitation about the need for improving the public relations of the Bar is really just an elaborate reminder that the Bar will have no need to worry about its public relations when it lives up to its great traditions. Those can be understood and they touch great chords of the human spirit. And when they are followed we can, as Judge Learned Hand has said, look back without wincing.

WHITNEY NORTH SEYMOUR

*May 14, 1952*

# A Trial Judge's Freedom and Responsibility

By Charles E. Wyzanski, Jr.[1]

*United States District Judge, District of Massachusetts*

THE ELEVENTH ANNUAL BENJAMIN N. CARDOZO LECTURE
DELIVERED BEFORE THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK ON APRIL 29, 1952

## *Introduction by The Honorable Augustus N. Hand*

In 1930 I had the good fortune to secure Wyzanski for my first law clerk on the recommendation of Professor Beal of the Harvard Law School.

His father and mother lived in a spacious house in Brookline, Massachusetts, and his Uncle Max lived in a similar house across the street. Charlie was a clerk in the office of Ropes, Gray, Boyden & Perkins, the head of which was my classmate, Nelson Perkins. He let Charlie come to me for a year as my law clerk, and he soon endeared himself to me, not only because of his discriminating legal mind, but also because of his wide reading and general culture.

No law clerk ever came to the judges of the Second Circuit who was as thoroughly educated in economics, philosophy, history, and literature as this young man. Many hours we spent in discussing the Greeks and the great figures of the Renaissance, particularly my old friend, Erasmus of Rotterdam, Sir Thomas More, as well as Spinoza and the moderns.

He left me in the summer of 1931, and about two years later became solicitor for the Labor Department in Washington. There he was at once confronted with the novelty and confusion of his new job.

After about two years, he joined the staff of the Department of Justice, and was soon allowed to argue small appeals before the Supreme Court, which then had Chief Justice Hughes and Justices

Vandevanter, Brandeis, Stone, and Cardozo among its most distinguished members.

In 1937, he was asked by the Solicitor General, now Mr. Justice Stanley Reed, to argue several of the Wagner and Social Security appeals. He was then but thirty years old, but Justices Vandevanter, Brandeis, Stone, and Cardozo told me they had never heard better arguments, always successful. After making them, he went to Salzburg to hear Toscanini and his orchestra and get over his legal struggles.

He then returned to Ropes, Gray to practice law in Boston. It was like what my boy friend in Elizabethtown used to call "getting off the bandwagon to lead the camels." But he stuck to it, and Nelson Perkins told me over the telephone in 1938 that he was to take Wyzanski into his firm, and that he was glad to have such a fine young partner.

Since then he has been twice elected an Overseer of Harvard, likewise became a Trustee of Phillips Exeter Academy, his old school, at the instance of the elder Thomas Lamont, and is now also a Trustee of Smith College.

More than this, he has become a member of the old Saturday Club of Emerson, Norton, James Russell Lowell, and the elder Holmes, succeeding the famous mathematician and philosopher, Alfred North Whitehead, and he has made an enviable record as United States District Judge for the District of Massachusetts.

As Cicero said years ago. "Their is nothing which he has touched that he has not adorned."

It is fortunate that a man of his learning and, I believe, wisdom, should give this lecture founded by Cardozo, the greatest of those common law and equity judges in New York, which produced Kent and later a bench which comprised Nelson, Bronson, Cowan, and Chancellor Walworth, and gave us what Judge Jeremiah Smith used to tell me he considered the strongest common law court in the United States.

Now for a little stuff, as they say, off the cuff: This young man was more or less of a trouble to his mother. She used to write me about getting him married, and we were engaged in certain common enterprises to that end. But he seemed to be happy enough as he was, and

he would get off the half melancholy, half jocose, and very poetical remarks of Santayana:

> There may be chaos still around the world,
> This little world that in my thinking lies;
> For mine own bosom is the paradise
> Where all my life's fair visions are unfurled.
> Within my nature's shell I slumber curled,
> Unmindful of the changing outer skies,
> Where now, perchance, a new-born Eros flies,
> Or some old Cronos from his throne is hurled.
> I heed them not; or if the subtle night
> Haunt me with deities I never saw,
> I soon mine eyelid's drowsy curtain draw
> To hide their myriad faces from my sight.
> They threat in vain; the whirlwind cannot awe
> A happy snowflake dancing in the flaw.

But time went on, and now he is married, the father of a family, and he really came to the point where the lines of Schiller, in German, became appropriate to Gisela Warburg, whose wedding I attended and who is with us tonight.

> In Einem Thal bei armen Hirten
> Erschien mit jedem Jahr,
> Sobald die ersten Lerchen schwirrten,
> Ein Madchen schon und wunderbar.
>
> Sie war nicht in dem Thal geboren,
> Man musste nicht, woher sie kam;
> Und schnell war ihre Spur verloren,
> Sobald das Madchen Abschied nahm.

---

EVEN before that introduction, I was so indebted to Judge Hand that nothing that I say could in any way adequately acknowledge the debt. So I shall not try by words to do what only conduct can attempt to do. But there was one aspect of my relations with Judge Hand to which he did not refer but which I may appropriately mention this evening. It was through his

courtesy that twenty-one years ago I first met Judge Cardozo. For me no occasion could be happier than to have another opportunity under the sponsorship of Judge Hand to reflect on the great contributions which Judge Cardozo has made to our law.

Those who appeared before him knew his courtesy, humility and purity. Those who read his opinions and essays recall how completely he fulfilled the four-fold prayer of Saint Thomas Aquinas for "sharpness in understanding, sagacity in interpretation, facility in learning, and abundant grace in expression."[3] And to those whose unremitting search is to find the nexus between law and morals his example remains a constant guide. Judge Cardozo did far more than infuse the law of torts, of commerce, and of fiduciary obligations with higher standards of rectitude. He viewed the law in all its branches not solely as an authoritative technique for the resolution of strife, but chiefly as a social process for recognizing and marshalling the values that we prize. Yet he never forgot that in this process the ethical test of the judge is not whether his judgments run parallel to the judgments of a moralist, but whether the judge administers his office true to its traditional limitations as well as to its aspirations.

The tradition in which Judge Cardozo worked and wrote was that of the appellate court. Admittedly this is the most philosophical branch of our calling. There arise the questions of largest generality. Indeed it must often seem that by contrast in the lower courts what counts are not jurisprudential problems but that bundle of individual traits of character and manner[3] which Mr. Justice Shientag has called the "personality of the judge."[4] And yet from the day he takes his seat the trial judge is aware that while he has more personal discretion than the books reveal, he too is hemmed in by a developing tradition of impersonal usages, canons and legitimate expectations. While he has choice, he cannot exercise it even to his own satisfaction unless it is disciplined according to standards. The minima are supplied by reversals administered by appellate courts. Those, however, are necessarily only negative in nature. What counts more than the

rooting out of error is the establishment of affirmative norms of judicial behavior.

In discerning these norms, one difficulty is that what transpires in trial courts is not readily available. One man knows the practices only of his own and perhaps a few other courts. And so to evolve standards he must become critical of his own shortcomings, attentive to the reactions of the bar, informed of the unrecorded practices of his colleagues and, above all, reflective about subtle differences in the tasks assigned to him.[5]

### *I. JUDGE AND JURY*

The trial judge's first problem is his relationship to the jury. Much of the debate about the jury system rests on political premises as old as the eighteenth century. Montesquieu,[6] Blackstone[7] and their followers contended that lay tribunals with a plurality of members were the safeguard of liberty. Bentham[8] and more modern reformers replied that when the rule of law itself is sound, its integrity requires that its application be entrusted to magistrates acting alone. In their view responsibility is the secret of integrity, and a reasoned choice is the secret of responsibility.

Experience will not give a sovereign answer to these warring contentions. Yet the disagreement can be narrowed if the question of the jury's utility is subdivided with specific emphasis on separate types of suits.

The importance of this subdivision may be concealed by the striking phrase that a federal judge is the "governor of the trial."[9] Some regard this as an implied acceptance of the practice of English courts.[10] And they construe it as a broad invitation to exercise in all types of cases a right to comment upon the evidence, provided of course that the judge always reminds the jury in his charge that they are not bound to follow the court's view of the facts or the credibility of the witnesses. But such boldness is not the surest way to end disputes in all types of cases.

### A. TORT CASES

The trial judge's comments upon evidence are particularly unwelcome in defamation cases. In 1944 a discharged OPA official brought a libel suit against the radio commentator, Fulton Lewis, Jr.[11] At one stage in the examination I suggested that Mr. Lewis' counsel was throwing pepper in the eyes of the jury; and at the final summation I indicated plainly enough that, although the jury was free to reject my opinion, I thought Mr. Lewis had been reckless in his calumnious charges against the ex-OPA official. It makes no difference whether what I said was true; I should not have said it, as the reaction of the bar and public reminded me. A political libel suit is the modern substitute for ordeal by battle. It is the means which society has chosen to induce bitter partisans to wager money instead of exchanging bloody noses. And in such a contest the prudent and the second-thinking judge will stand severely aside, acting merely as a referee applying the Marquis of Queensberry rules.[12] In a later trial of a libel suit brought by James Michael Curley the gravamen of the complaint was that the Saturday Evening Post had said that Mr. Curley was a Catholic of whom His Eminence, Cardinal O'Connell would have no part.[13] Who knew better than the Cardinal whether that charge was true? Mr. Curley, the plaintiff, did not call the Cardinal to the stand. The defendant's distinguished counsel did not desire to find out what would be the effect upon a Greater Boston jury if a Protestant lawyer should call a Catholic prelate to the witness stand. Should the court have intervened and summoned the Cardinal on its own initiative? The Fulton Lewis case gave the answer. In a political[14] libel suit the judge is not the commander but merely the umpire.

Those tort cases which involve sordid family disputes also are better left to the jury without too explicit instructions. Plato implied[15] and Holmes explicitly stated[16] that judges are apt to be naïve men. If judges seem to comment on the morality of conduct or the extent of damages, they may discover that the

jurors entirely disregard the comment because they believe that their own knowledge of such matters is more extensive that the judges'. At any rate when brother sues brother,[17] or when spouse sues paramour,[18] the very anonymity of the jury's judgment often does more to still the controversy than the most clearly reasoned opinion or charge of an identified judge could have done.

What of the trial judge's role in accident cases? How far should he go in requiring available evidence to be produced,[19] in commenting on the testimony, and in using special verdicts[20] and like devices to seek to keep the jury within the precise bounds laid down by the appellate courts? There are some who would say that the trial judge has not fulfilled his moral obligation if he merely states clearly the law regarding negligence, causation, contributory fault and types of recoverable damage. In their opinion it is his duty to analyze the evidence and demonstrate where the evidence seems strong or thin and where it appears reliable or untrustworthy.[21] But most federal judges do not make such analyses. They are not deterred through laziness, a sentimental regard for the afflatus of the Seventh Amendment or even a fear of reversal.[22] They are mindful that the community no longer accepts as completely valid legal principles basing liability upon fault.[23] They perceive a general recognition of the inevitability of numerous accidents in modern life, which has made insurance widely available and widely used. Workmen's compensation acts and other social and economic legislation have revealed a trend that did not exist when the common law doctrines of tort were formulated. And the judges sense a new climate of public opinion which rates security as one of the chief goals of men.

Trial judges cannot, without violating their oaths, bow directly to this altered policy.[24] In instructions of law they must repeat the doctrines which judges of superior courts formulated and which only they or the legislatures[25] can change. But trial judges are not giving "rein to the passional element of our nature"[26] nor forswearing themselves by following Lord Coke's

maxim that "the jurors are chancellors."[27] Traditionally juries are the device by which the rigor of the law is modified pending the enactment of new statutes.

Some will say that this abdication is not merely cowardly but ignores the "French saying about small reforms being the worst enemies of great reforms."[28] To them the proper course would be to apply the ancient rules with full rigidity in the anticipation of adverse reactions leading to a complete resurvey of accident law; to a scrutiny of the costs, delays and burdens of present litigation; to a comparative study of what injured persons actually get in cash as a result of law suits, settlements out of court, administrative compensation proceedings and other types of insurance plans; and ultimately to a new codification. To this one answer is that in Anglo-American legal history reform has rarely come as a result of prompt, comprehensive investigation and legislation. The usual course has been by resort to juries,[29] to fictions,[30] to compromises with logic. Only at the last stages are outright changes in the formal rules announced by the legislators or the appellate judges. This is consistent with Burke's principle that "reform is impracticable in the sense of an abrupt reconstruction of society, and can only be understood as the gradual modification of a complex structure."[31]

Parenthetically, let me say that I am not at all clear that it would be a desirable reform in tort cases to substitute trial by judges for trial by juries. Just such a substitution has been made in the Federal Tort Claims Act.[32] And experience under that statute does not prove that in this type of case a single professional is as satisfactory a tribunal as a group of laymen of mixed backgrounds. In estimating how a reasonable and prudent man would act, judges' court experience counts for no more than juries' out-of-court experience.[33] In determining the credibility of that type of witness who appears in accident cases an expert tribunal is somewhat too ready to see a familiar pattern. Shrewdness founded on skepticism and sophistication has its place in scrutinizing the stories of witnesses. But there is a danger that

the professional trier of fact will expect people of varied callings and cultures to reach levels of observation and narration which would not be expected by men of the witness' own background. Moreover, when it comes to a calculation of damages under the flexible rules of tort law the estimate of what loss the plaintiff suffered can best be made by men who know different standards of working and living in our society. Indeed I have heard federal judges confess that in a Federal Tort Claims Act case they try to make their judgments correspond with what they believe a jury would do in a private case. And not a few judges would prefer to have such cases tried by juries.[84]

### B. COMMERCIAL LITIGATION

In commercial cases and those arising under regulatory statutes there is reason to hold a jury by a much tighter rein than in tort cases. This is not because the rules of law are more consonant with prevailing notions of justice.[85] In these controversies judges have a specialized knowledge. Parties have usually acted with specific reference to their legal rights,[86] and departures from the declared standard would undermine the legislative declaration and would be less likely to produce reform than confusion and further litigation. An extreme example will serve as an illustration. In a tax case[87] tried before a jury at the suit of one holder of International Match Company preference stock, the issue was whether for tax purposes those certificates had become worthless in the year 1936. In another taxpayer's case the Second Circuit Court of Appeals had affirmed a ruling of the Board of Tax Appeals that similar stock had become valueless in the year 1932.[88] Technically this adjudication did not bind the jury, though the evidence before it was substantially the same as that in the earlier case. To preserve uniformity on a factual tax problem of general application I had no hesitation in strongly intimating to the jury that they should reach the same result as the Second Circuit.

In sales cases, moreover, something close to a scientific ap-

praisal of the facts is possible. There are strong mercantile interests favoring certainty; and future litigation can be reduced by strict adherence to carefully prescribed statutory standards. These considerations sometimes warrant giving juries written instructions or summaries[39] and often warrant the use of special verdicts.[40] Either method makes jurors focus precisely on the formalities of the contract, the warranties alleged to have been broken, the types of damage alleged to have been sustained, and the allowable formulae for calculating those damages. Indeed, except for tort cases, I find myself in agreement with Judge Frank[41] that the trial judge ought to use special verdicts to a much larger extent, though it is more difficult than may at first be realized to frame questions to the satisfaction of counsel and to the comprehension of juries.[42] Once when I used what I thought simple questions, a fellow judge, half in jest, accused me of trying to promote a disagreement of the jury and thus to force a settlement.

The arguments supporting special verdicts in commercial or statutory cases also support a trial judge in giving in such cases a more detailed charge and more specific guidance in estimating the testimony. In complicated cases or those in fields where the experience of the average juror is much less than that of the average judge, there is a substantial risk of a miscarriage of justice unless the judge points rather plainly to the "knots"[43] in the evidence and suggests how they can be unravelled. The only time I have ever entered judgment notwithstanding a verdict was in a private antitrust suit.[44] The jury had awarded damages of over one million dollars due, I believe, to the generality of my instructions. I should have spent as much time on my charge in helping them understand the testimony as I later spent on the memorandum in which I analyzed the evidence for an appellate court.[37] And one of the few totally irrational awards that I have seen a jury make came in a compromise verdict in a breach of contract case[45] brought by a plaintiff of foreign birth against a defendant who came from the dominant local group. The charge had stop-

ped with broad, though probably correct, statements of the substantive law. The jury should have been told that their choice lay between only two alternatives—either to find for the plaintiff for the full amount claimed or to find for the defendant. Any intermediate sum could be attributed only to a discount for prejudice or a bounty for sympathy.

### C. CRIMINAL PROSECUTIONS

At the trial of criminal cases the judge's role more closely resembles his role in tort cases than in commercial litigation. About ninety percent of all defendants in the federal court plead guilty. In those federal cases which come to trial the crime charged frequently concerns economic facts; and generally, though not invariably, the preliminary investigation by the FBI and other agencies of detection has reduced to a small compass the area of doubt. Often the only remaining substantive issue of significance is whether the defendant acted "knowingly."[46] Indeed, the usual federal criminal trial is as apt to turn on whether the prosecution has procured its evidence in accordance with law and is presenting it fairly, as on whether the defendant is guilty as charged. All these factors combine to concentrate the judge's attention upon the avoidance of prejudicial inquiries,[47] confusion of proof[48] and inflammatory arguments.[49] Counsel can aid the judge to maintain the proper atmosphere by stipulation,[50] by refraining from putting doubtful questions until the judge has ruled at the bench, and by other cooperative efforts. But if cooperation is not forthcoming, the judge should hesitate to fill the gap by becoming himself a participant[51] in the interrogation or to indicate any view of the evidence.[52] For the criminal trial is as much a ceremony as an investigation. Dignity and forbearance are almost the chief desiderata.

But as Mr. Justice McCardie said, "Anyone can try a criminal case. The real problem arises when the judge has to decide what

punishment to award."[58] On the sentencing problem[59] three observations may be worth making:

(1) Despite the latitude permitted by the due process clause,[60] it seems to me that a judge in considering his sentence, just as in trying a defendant, should never take into account any evidence, report or other fact which is not brought to the attention of defendant's counsel with opportunity to rebut it. *Audi alteram partem,* if it is not a universal principle of democractic justice,[60] is at any rate sufficiently well-founded not to be departed from by a trial judge when he is performing his most important function. In those situations where a wife, a minister, a doctor or other person is willing to give confidential information to the judge provided that the defendant does not hear it, this information ought to be revealed to the defendant's counsel for scrutiny and reply. This in no sense implies "a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial"[61] or "open court testimony with cross-examination."[62] Other methods will avoid those grave errors which sometimes follow from acting on undisclosed rumor and prejudice.

(2) Another nearly universal principle applicable to criminal sentences is equality of treatment. Despite the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime,"[63] the sentencing judge is not the precise equivalent of a doctor giving an individual a medical prescription appropriate to a unique personality. Offenders of the same general type should be treated alike at least in the same community.[64] One reason is grounded on a strictly scientific consideration emphasized by Morris R. Cohen, "We are apt to have more reliable knowledge about classes than about individuals."[65] But a deeper ethical consideration is embedded in an Alexandrian metaphor, equality is the mother of justice.[66] With this test in mind, I submit that if in the district in which a judge sits his fellow judges have established and insist on following a pattern for dealing with offenders of a particular type, it is his respon-

sibility either to get them to change or to come close to their standard.

(3) My third observation relates to whether a judge should give the reasons for his sentence. Eminent and wise judges have warned me against this. Our judgment, they say, is better than our reasons. And it is vain to attempt to explain the exact proportions attributable to our interest in punishment, retribution, reform, deterrence, even vengeance. But are these arguments valid? For there is grave danger that a sentencing judge will allow his emotion or other transient factors to sway him. The strongest safeguard is for him to act only after formulating a statement of the considerations which he allows himself to take into account. Moreover, the explicit utterance of relevant criteria serves as a guide for future dispositions both by him and other judges.[82]

## *II. NONJURY TRIALS*

### A. HANDLING OF EVIDENCE AND EXTRA-JUDICIAL MATERIAL

In nonjury as in jury cases, a substantial part of the bar prefers to have the judge sit patiently while the evidence comes in and then at the end of the trial summarize the testimony which he believes. This seems the sounder practice in the great bulk of trials. But in cases of public significance, Edmund Burke admonished us: "It is the duty of the Judge to receive every offer of evidence, apparently material, suggested to him, though the parties themselves through negligence, ignorance, or corrupt collusion, should not bring it forward. A Judge is not placed in that high situation merely as a passive instrument of parties. He has a duty of his own, independent of them, and that duty is to investigate the truth."[83]

Let me give some examples of when I believe the judge has a duty to elicit facts in addition to those that are offered by the parties. The plaintiff, an owner of a multiple dwelling, brought suit for a declaratory judgment seeking to have the premises

declared a "hotel" and thus exempt from the rent regulations of the OPA.[65] Only one of the numerous tenants was named as defendant. In the trial the plaintiff offered evidence that the building was a hotel and not an apartment. Due to lack of funds or due to lack of forensic skill, the tenant's counsel failed to shake the stories of the plaintiff's witnesses or to offer adequate testimony to the contrary. Yet if the trial judge had called specialists and others familiar with the community and the property, the evidence would have demonstrated that in truth the building was a mere apartment house. I took no step myself to call witnesses or to interrogate those who did testify but, relying exclusively on what the parties offered, entered a judgment declaring the premises a "hotel" and thus exempt. Since this declaration of status became in effect, though not in law, a general rule practically, though not theoretically, binding on scores of persons not actually represented in the proceedings, would it not have been sounder for the court to take a larger initiative in seeing that the record corresponded with reality?

A later controversy of even greater public importance posed a similar problem. In a case still undecided, the United States sued the United Shoe Machinery Corporation for violation of the antitrust laws.[66] Among the issues presented was what was the effect of the corporation's acts upon its customers and upon its competitors. The Government in its case in chief relied exclusively on the corporation's documents and officers. The corporation planned to call some customers, though the method by which they were drawn was not disclosed to the court. This seemed an inadequate survey. So the court asked the parties to take depositions from forty-five customers, selected from a standard directory by taking the first fifteen names under the first, eleventh and twenty-first letters of the alphabet; and the court itself called to the stand the officers of the principal competitor. In the summons the court listed topics appropriate for questioning the officers. The actual examination was conducted in turn by the competitor's counsel, the Government's counsel, and the defendant's

counsel. Both these types of testimony gave a much clearer understanding of the total picture of the industries that will be affected by any decision.

Another problem in the *United Shoe* case has been to determine what have been the usual methods followed by the defendant in setting prices, in supplying services, and in suing competitors. An adequately grounded conclusion can hardly be based entirely on the plaintiff's selection of a few dramatic incidents and on the defendant's testimony of the general attitude of its officers. The critical point in determining liability and, even more probably, the form of relief, if any, may turn on what has been the typical pattern of the defendant's conduct and the typical effect of that conduct on outsiders. Here the judge can perform a useful function if he, through pretrial conferences or at a later stage of the litigation when he is more aware of its dimensions, provides for appropriate samplings of the conduct and the effect. If the judge is fortunate, the parties may agree on the sampling. But where they do not, it seems to me to be the judge's responsibility first to elicit from witnesses on the stand the criteria necessary to determine what are fair samples and then to direct the parties to prepare such samples for examination and cross-examination. Sampling will make for not merely a more informative but a shorter record – an object to which both bench and bar must give more attention if the judicial process is to survive in antitrust cases.

The question as to what has been the custom of the market and what would be the consequence of a judicial decree altering those practices arises not only in antitrust cases but also when the judge is faced with the problem of determining either the appropriate standard of fair competition in trademarks or the appropriate standard for fiduciaries. Usually, to be sure, diligent counsel offer in evidence enough relevant material. But where this has not been done, there have been times when a judge has tended to reach his result partly on the basis of general information and partly on the basis of his studies in a library.[11] This

tendency of a court to inform itself has increased in recent years following the lead of the Supreme Court of the United States. Not merely in constitutional controversies and in statutory interpretation but also in formulation of judge-made rules of law, the justices have resorted, in footnotes and elsewhere, to references drawn from legislative hearings, studies by executive departments, and scholarly monographs. Such resort is sometimes defended as an extension of Mr. Brandeis's technique as counsel for the state in *Muller v. Oregon*.[68] In Muller's case, however, Mr. Brandeis's object was to demonstrate that there was a body of informed public opinion which supported the reasonableness of the *legislative* rule of law. But in the cases of which I am speaking these extra-judicial studies are drawn upon to determine what would be a reasonable judicial rule of law.[69] Thus the focus of the inquiry becomes not what judgment is permissible, but what judgment is sound. And here it seems to me that the judge, before deriving any conclusions from any such extra-judicial document or information, should lay it before the parties for their criticism.

How this criticism should be offered is itself a problem not free from difficulty. In some situations, the better course may be to submit the material for examination, cross-examination and rebuttal evidence. In others, where expert criticism has primarily an argumentative character, it can be received better from the counsel table and from briefs than from the witness box.[70] The important point is that before a judge acts upon a consideration of any kind, he ought to give the parties a chance to meet it. This opportunity is owed as a matter of fairness and also to prevent egregious error. As Professor Lon Fuller has observed, the "moral force of a judgment is at maximum if a judge decides solely on the basis of arguments presented to him. Because if he goes beyond these he will lack guidance and may not understand interests that are affected by a decision outside the framework."[71]

The duty of the judge to act only upon the basis of material debated in public in no sense implies that the judge's findings

should be in the precise terms offered by counsel. Nor does Rule 52 (a) of the Federal Rules of Civil Procedure require the judge always to recite all relevant evidence and to rely for persuasive effect exclusively upon mass and orderly arrangement. Yet in corporate cases or other litigation where the issues turn on documentary construction and precise analysis of business details, and where appeal is almost certain to be taken, the trial judge may perform the greatest service by acting almost as a master summarizing evidence for a higher tribunal.[72]

On the other hand, if a judge sitting alone hears a simple tort or contract case falling with a familiar framework and analogous to jury litigation, it is perhaps the best practice for him to state his findings of fact from the bench in those pungent colloquial terms with which the traditional English judge addresses the average man of common sense.[73] When credibility of witnesses is the essence of the controversy, the parties and the lawyers like to have judges act as promptly as juries and, like them, on the basis of fresh impressions.

Where the search for truth is more subtle, the trial court faces the same stylistic challenge as the appellate court. Fortunate are those who like Judge Learned Hand have the gift of many tongues. His admiralty opinions breathe salt air, his commercial cases echo the accents of the market place and his patent rulings reflect an industrial society developed by Yankee ingenuity. Even those whose narrower experience makes them stutter, occasionally strike a subject where they have both the sensitivity and the self-confidence to put the story simply and selectively.[74] But in most cases judges can only try to make their summations of facts as pithy, sympathetic and illuminating as those of Judge Cardozo, even though a study of that master may lead to the conclusion of T. S. Eliot that "the inferiority of common minds to great is more painfully apparent in those modest exercises of the mind in which common sense and sensibility are needed, than in their failure to ascend to the higher flights of genius." [75]

### B. DEFERENCE TO PRIOR DETERMINATIONS

While in summarizing the facts trial judges may seek to imitate their superiors on the higher courts, when they wrestle with the substantive law they should not regard themselves as the appellate judges writ small. Their freedom is inevitably more narrowly exercised. Most of the time they do not even see the points of difficulty too clearly. With them the pace is quicker, the troublesome issues have not been sorted from those which go by rote, the briefs of counsel have not reached their ultimate perfection. Yet even when he has the clearest perception of the legal issues, certain inhibitions are peculiarly appropriate to restrain a judge who sits alone and subject to review by judges higher in commission.

If the trial judge is presented with the claim that a legislative act is unconstitutional, he ought to remind himself not only of the universal maxim that every possible presumption is in favor of the validity of the legislation but also of the policy represented by those statutes providing that in certain constitutional controversies a district judge has no jurisdiction to act unless he is sitting with two other judges.[76] Though in a constitutional case or any other case he must not surrender his deliberate judgment and automatically accept the views of others,[77] he can ordinarily best fulfill his duty in a constitutional case by explicitly stating for the benefit of an appellate court any doubts he has, without going so far as to enter a decree against a statute which has commanded the assent of a majority of the legislature and, generally, of the executive.

If there is no constitutional question and the trial judge is presented with a judicial precedent or precedents contrary to his own view of what would be the sound rule of law, the problem is more subtle. First, take the situation where the hostile precedents are in the tribunals that sit in review of his own decisions. If the precedents have been so severely impaired by recent cases

that it is reasonably clear they no longer represent the present doctrine of the appellate court, the trial judge is generally thought to be free to minimize their directive force,[78] though there is strong opinion to the contrary.[79] Where the precedent has not been impaired, the balance is in favor of the trial judge following it in his decree and respectfully stating in his accompanying opinion such reservations as he has.[80] The entry of the decree preserves that "priority and place"[81] which Shakespeare reminded us were indispensable to justice. Moreover, the reservation in the opinion promotes the growth of the law in the court where it most counts, for if the criticism of the precedent be just, the appellate court will set matters straight, and any trial judge worthy of his salt will feel complimented in being reversed on a ground he himself suggested. No trial judge of any sense supposes his quality is measured by a naked tabulation of affirmances and reversals.

Where the hostile precedents come from a judge of equal rank or a court not in the direct line of superior authority, I doubt whether there should be absolute rules of deference. If the precedent is from a sitting judge in one's own court and represents his mature reflection, the argument in favor of following it rests not only on the appropriate amenities, but also on profounder considerations of equality in the treatment of litigants. But the situation is different where the precedent comes from an inferior court sitting in another geographical area. In the federal system conflict of judgments between the inferior courts is one of the ways that the Supreme Court is led to grant review of legal questions. And the most effective method of getting a significant issue over the Washington threshold is to challenge overtly a court in another circuit.[82]

Another pressing problem of deference has been raised by the spawn of *Erie Railroad v. Tompkins*.[83] We federal judges are told that in diversity jurisdiction cases our duty is to follow the state law. Most of the time that is readily discoverable. But what are we to do when no state law has been declared or the

state law has not been the subject for reconsideration for a generation or more? Take unfair competition cases, at least before the Lanham Act.[54] Until the end of the rule of *Swift v. Tyson*[55] the state law lay relatively dormant. Most of the important controversies in this field had always been adjudicated in the federal courts and by them according to a general jurisprudence. What happens when these federal cases are not binding authorities? Shall we seek to evolve the state rules exclusively from state precedents, some of which are quite old, and ignore the federal precedents?[56]

Shall we be equally conservative in corporation cases? A policyholder recently brought a derivative suit in the United States District Court for the District of Massachussetts against an insurance company without first seeking to enlist the aid of his fellow policyholders.[57] The reported Massachusetts cases involved stockholders' suits. None of them was precisely in point. Some of the rulings were not addressed to considerations recently stressed by other courts and by legislatures and administrative agencies. Should the federal court have followed closely what the state had already said, or should it keep one eye on the national trend? Consider also the case of a stockholder seeking to procure an equity receivership for the purpose of liquidating a corporation.[58] The only Massachusetts decisions are old and negative. The modern trend is favorable. Shall the federal court assume that the Massachusetts state court will follow its predecessors or its contemporaries?

The impression that I gather from the cases is that a federal judge sitting in a diversity jurisdiction case is less willing to depart from obsolete doctrines than when he sits in a purely federal case. And this reluctance is not apt to be modified by the action of his superiors in the federal courts. On questions of state law federal appellate courts repeatedly state their reliance on the knowledge possessed by federal trial judges sitting in the locality. Thus the total tendency of the *Erie Railroad* doctrine has a strong reactionary direction which it is hard to believe its

proponents and expansionists appreciated. Perhaps, indeed, this is part of a larger problem of the twentieth century judicial emphasis on conflict of laws. Every time judges are called upon to apply the law of a foreign jurisdiction, are they not inclined to give undue weight to the recorded landmarks and to underestimate the mobile qualities and the thrusts of principle we discern in our domestic law?

### C. CASES OF FIRST IMPRESSION

From the discussion above it may appear that the trial judge almost never sees a problem of first impression. Of course, his percentage of novel cases is much smaller than that of the appellate judge. But they do come. Indeed, the percentage and type of novel cases may depend on the judge's own interests and his alertness to emphasize novel points not fully appreciated by counsel. Did *MacPherson v. Buick Motor Co.*,[89] *Glanzer v. Shepard*,[90] and *Palsgraf v. Long Island R.R.*[91] come to Judge Cardozo with what we now regard as their distinctive significance already marked — or was Judge Cardozo prepared by prior study and reflection to look for possibilities of extending the law of negligence? Is it not true of original judges as of original scientists that "success comes to the prepared mind," to use Pasteur's phrase?

If the answer is in the affirmative, then the bar may be following the wrong track in its recent insistence[92] on the isolation of the Judiciary from all tasks except those of hearing and deciding cases in court. Some judges, like Cardozo, have their horizons widened and their interests stimulated by studying, lecturing and writing. Other judges, without becoming enmeshed in public controversy, may by occasional service on commissions of inquiry be led to such a fresh understanding of this dynamic world that they will bring novel or profounder insights to their judicial tasks.

### *III. THE TRIAL JUDGE'S CONTRIBUTION TO LAW*

Before I conclude, it may be well to tackle a question which might have been asked at the outset. Are the usages followed by trial judges anything more than patterns of behavior? Are they law in any sense?[93] And even if they are law, are they too disparate and detailed ever to have an honored place in the study of jurisprudence?

Concede that the normative practices which have here been reviewed fall far short of the Austinian command of the sovereign. For a judge who chooses to depart from these particular standards does not lay himself to reversal by courts of superior authority. And yet that which is generally approved as being good and being within the reach of average men does in time become law in the strictest sense. This is how the law of fiduciaries and the law merchant have grown. And the principle applies in equal measure to the law governing trial judges. What is the whole law of procedure[94] but the crystallization of judicial custom? The trial judges made the law of evidence by their usages;[95] and perhaps now they are remaking it.[96] This alteration is hidden by appellate courts which treat departures from the proclaimed evidentiary rules not as though they represented new doctrine,[97] but as though they were insignificant nonreversible errors.[98] What are the rules governing measure of proof? Today it is said that there exist in the federal courts only two standards: the criminal standard of proof beyond a reasonable doubt and the civil standard of the preponderance of the evidence.[99] And yet already in some special classes of cases where fraud is the central issue, there seems to be emerging an intermediate rule, the requirement that the evidence shall be clear and convincing.[100] This intermediate requirement reflects the unspoken practice of trial courts to move with extreme caution in fastening a finding of immoral conduct upon a party litigant. What shall be said of remedies which trial judges have newly evolved in equitable suits founded on stat-

utes?[101] Novel remedies begin as permissible exercises of discretion by the court of first instance.[102] They win approval and imitation by other similarly circumstanced courts. And in the end what was discretionary has become mandatory.[103] Here is the common law at work[104]—a progressive contribution by the judges, trial as well as appellate; perhaps less important today than formerly, and always less important than the additions made by legislative bodies; but more clearly ethical in its nature because the consent on which it rests has undergone a longer, more intimate, more pragmatic test.

It should not be supposed that because his jurisdiction is limited, because so much of his work goes unreported, because he is immersed in the detail of fact, the trial judge is clothed with small responsibility in relating law to justice. It is he who makes the law become a living teacher as he transmits it from the legislature and the appellate court to the citizen who stands before him.[105] It is he who watches the impact of the formal rule, explains its purpose to laymen and seeks to make its application conform to the durable and reasonable expectations of his community.[106] It is he who determines whether the processes of common law growth shall decay or flower with a new vigor.

## FOOTNOTES

[1] Judge Wyzanski is the United States District Judge for the District of Massachusetts. A.B., Harvard, 1927; LL.B., 1930.

[2] Quoted by S. E. Morison, *Faith of a Historian*, 56 AM. HIST. REV. 261, 275 (1951).

[3] *Cf.* CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 163 (1922): "the cases where the controversy turns not upon the rule of law, but upon its application to the facts . . . call for intelligence and patience and reasonable discernment on the part of the judges who must decide them. But they leave jurisprudence where it stood before."

[4] SHIENTAG, THE PERSONALITY OF THE JUDGE (Ass'n of the Bar of the City of New York, 1944) (Third Annual Cardozo Lecture).

[5] *Cf.* Llewellyn, *Law and the Social Sciences—Especially Sociology*, 62 HARV. L. REV. 1286, 1296–97 (1949).

[6] MONTESQUIEU, SPIRIT OF THE LAWS VI, c. 6, pp. 79–80 (Nugent's transl. 1949).

[7] 3 BL. COMM. *349–50; 4 *id.* *349.

[8] See HALÉVY, THE GROWTH OF PHILOSOPHIC RADICALISM 397–403 (1949).

[9] The phrase comes from several Supreme Court opinions, the most notable being that of Hughes, C. J., in Quercia v. United States, 289 U. S. 466, 469 (1933). From time to time bills to reduce the federal judge's role in instructing juries have been introduced in Congress. The Judicial Conference of the United States has uniformly disapproved such bills. See *Report of the Proceedings of a Special Meeting of the Judicial Conference of the United States*, March 20–21, 1952, pp. 13–15.

[10] Yet no federal judge would be likely to give as detailed, as long, or as leading a charge as say Lord Wright's admirable summing up in *The Royal Mail Case*, see NOTABLE BRITISH TRIALS, THE ROYAL MAIL CASE 222–62 (Brooks ed. 1933); or Lord Chief Justice Goddard's summing up in *The Laski Libel Action*, see THE LASKI LIBEL ACTION 367–98 (1947). Lord Wright's charge must have lasted at least four hours and Lord Goddard's two.

[11] Balsam v. Lewis, Civil No. 2259, D. Mass., Jan. 27, 1944.

[12] See the introductory remarks of Lord Chief Justice Goddard in his summing up in *The Laski Libel Action*. THE LASKI LIBEL ACTION 367 (1947).

[13] Curley v. Curtis Publishing Company, Civil No. 1872, D. Mass., Feb. 25, 1944.

[14] In a libel suit where political and like emotional elements are absent, a judge may do as well as a jury. *Cf.* Kelly v. Loew's, Inc., 76 F. Supp. 473 (D. Mass. 1948).

[15] PLATO, THE REPUBLIC III 409.

[16] Holmes, *Law and the Court in* COLLECTED LEGAL PAPERS 291, 295 (1920).

[17] Hegarty v. Hegarty, 52 F. Supp. 296 (D. Mass. 1943).

[18] Gordon v. Parker, 83 F. Supp. 40, 43, 45 (D. Mass.), *aff'd*, 178 F.2d 888 (1st Cir. 1949). It may be said that divorce cases are contrary to my thesis. But is it not true that most divorce cases involve either no contest or an attempt by the judge to act as conciliator? Where there is a bitter contest, many divorce court judges, I believe, would rather have the issue put to a jury, if that were possible.

[19] See the suggestion of Frankfurter, J., dissenting in Johnson v. United States, 333 U. S. 46, 54–55 (1948).

[20] A special verdict in a tort case by minimizing the emotional considerations is more likely than a general verdict to produce a judgment for defendant. Mills v. Eastern Steamship Lines, Inc., Civil No. 7366, D. Mass., Dec. 3, 1948. Perhaps this consideration was not absent in the different approaches disclosed in the opinions of Judge Clark and Judge Frank in Morris v. Pennsylvania R. R. Co., 187 F. 2d 837, 840–41, 843 (2d Cir. 1951). See also Skidmore v. Baltimore & Ohio R. R., 167 F. 2d 54, 65–67, 70 (2d Cir. 1948).

[21] *Cf.* Frankfurter, J., concurring in Wilkerson v. McCarthy, 336 U. S. 53, 65 (1949): "A timid judge, like a biased judge, is intrinsically a lawless judge."

[22] It would, however, be less than candid for an inferior federal judge to deny the indirect, as well as the direct, effect of recent decisions of the Supreme Court of the United States tending toward leaving large scope to juries in accident cases. See Wilkerson v. McCarthy, 336 U. S. 53 (1949); Bailey v. Central Vermont Ry., 319 U. S. 350 (1943), and the cases there collated.

[23] In 1897 Holmes wrote, "why do the jury generally find for the plaintiff if the case is allowed to go to them? The traditional policy of our law is to confine liability to cases where a prudent man might have foreseen the injury, or at least the danger, while the inclination of a very large part of the community is to make certain classes of persons insure the safety of those with whom they deal." Holmes,

*The Path of the Laws*, 10 HARV. L. REV. 457, 466 (1897); HOLMES, COLLECTED LEGAL PAPERS 182, 183 (1920). Two years later he said, "one reason why I believe in our practice of leaving questions of negligence to them is what is precisely one of their gravest defects from the point of view of their theoretical function: that they will introduce into their verdict a certain amount—a very large amount, so far as I have observed—of popular prejudice, and thus keep the administration of the law in accord with the wishes and feelings of the community." Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 459–60 (1899); HOLMES, COLLECTED LEGAL PAPERS 237–38 (1920). As to whether today the formal test of appellate judges has changed from liability for fault, *compare* Douglas, J., concurring in Wilkerson v. McCarthy, 336 U. S. 53, 70 (1949), *with* Jackson, J., dissenting in *id.* at 76.

[24] There are some judges who take this altered policy into account in inducing parties to settle. No study of the living law of torts can properly neglect the importance of these settlements. They have increased at a rapid rate as a consequence of congested dockets and the wider use of pre-trial techniques encouraged by Rule 16 of the Federal Rules of Civil Procedure. They are popular with the bar and many clients. They ease the otherwise insupportable load on the judicial system. And they make even the judge who does not approve of the degree to which other judges induce settlements, himself unwilling to take strong measures to lead a jury in directions contrary to those upon which settlements have been and will be reached.

[25] Compare the recent approach of the Supreme Court to the problem of contribution among joint tortfeasors. Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U. S. 282 (1952).

[26] L. Hand in Skidmore v. Baltimore & Ohio R. R. Co., 167 F.2d 54, 70 (2d Cir. 1948).

[27] Quoted from POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 133 (1922).

[28] MORLEY, ON COMPROMISE 185 (rev. ed. 1877).

[29] In Chapters VIII and IX of *COURTS ON TRIAL* Judge Frank, while admitting that some reforms are attributable to jury lawlessness, in general distrusts such methods. He suggests that certainty and equality are impossible because one jury differs so much from another. This difference he says is recognized by the bar which gives great attention to the selection of jurors (pp. 120–21). This argument may be overstated. In the Massachusetts District there are rarely more than two or three challenges to jurors in any but criminal cases. It ordinarily takes less than five minutes, and in the last decade has never taken more than half an hour, to select a jury. And these juries tend to act so uniformly that the court officers and attendants who have sat with hundreds of juries can make a substantially accurate prediction of how any given jury will act. Indeed, their prediction of jury action is much closer to the ultimate result than their prediction of judicial actions.

[30] M. Cohen, *The Process of Judicial Legislation in* LAW AND THE SOCIAL ORDER 112, 126 (1933).

[31] Quoted in 2 L. STEPHEN, A HISTORY OF ENGLISH THOUGHT IN THE EIGHTEENTH CENTURY 230 (1881).

[32] 62 STAT. 982, as amended, 28 U.S.C. §§ 2671 *et seq.* (Supp. 1951).

[33] In setting the standard of conduct for reasonable automobile drivers who approach railroad grade crossings, as great a judge as Holmes made an error that no jury would have made. Baltimore & Ohio R.R. v. Goodman, 275 U.S. 66 (1927).

[34] This paragraph is admittedly contrary to the views expressed by Judge Frank in *COURTS ON TRIAL* (pp. 137–38). He assumes that no judge would give juries jurisdiction over types of cases that are now tried without a jury.

[35] No doubt there are some judges who distinguish between the enforcement of apparently fair contracts and contracts in which advantage has been taken of a necessitous party. In the latter group sometimes fall not merely releases but installment contracts, leases and loans. But I have not observed in the federal courts a tendency to encourage jury lawlessness in these controversies.

[36] Although there are some exceptions, usually parties to an accident case have acted without reference to the law, whereas the law has been one of the considerations in contemplation when parties to a commercial transaction took their action. The chief exceptions are where the tort defendant failed to take out insurance because he supposed there was no risk of liability save for misconduct, and the rare case where a contract defendant made or broke his promise without attention to the written rules of law.

[37] Clark v. Welch, Civil No. 3944, D. Mass., April 7, 1943, *aff'd*, 140 F.2d 271, 274 (1st Cir. 1944).

[38] Young v. Commissioner, 123 F.24 597 (2d Cir. 1941).

[39] Perry Sportswear, Inc. v. O'Keefe Tanning Corp., Civil No. 1871, D. Mass., Jan. 21, 1944.

[40] Boyce v. Fowler, 87 F. Supp. 796 (D. Mass. 1949); *The Bank of Nova Scotia* v. *San Miguel*, 1st. cir. No. 4575, May 14, 1952.

[41] FRANK, COURTS ON TRIAL 141 (1949).

[42] See Boyce v. Fowler, 87 F. Supp. 796 (D. Mass. 1949). Compare two tort cases and an eminent domain case where the difficulties were also obvious. Van Sant. v. American Express Co., 169 F.2d 355, 369–70 (3d Cir. 1948); Curley v. Curtis Publishing Co., 48 F. Supp. 29 (D. Mass. 1942); United States v. 40,379 Square Feet of Land, 58 F. Supp. 246 (D. Mass. 1944).

[43] 2 HALE, HISTORY OF COMMON LAW 147, 156 (5th ed. 1794), cited in Capital Traction Co. v. Hof, 174 U.S. 1, 14 (1899).

[44] Momand v. Universal Film Exchange, Inc. 72 F. Supp. 469 (D. Mass. 1947), *aff'd*, 172 F.2d 37 (1st Cir.1948).

[45] Schleifer v. Killion, Civil No. 8030, D. Mass., Nov. 22, 1949, *aff'd*, 183 F.2d 237 (1st Cir. 1950).

[46] *Cf. Morissette* v. United States, 342 U. S. 246, 72 (1950).

[47] Problems of discretion such as are presented in Michelson v. United States, 335 U.S. 469 (1948), are probably tending toward crystallization in different districts. In the Massachusetts District the judges are reluctant to allow reputation witnesses to be asked about defendant's prior crimes unless closely related to veracity. United States v. Gaunt, Crim. No. 18,201, D. Mass., Oct. 10, 1949, *modified and aff'd*, 184 F.2d 284 (1st Cir. 1950), *cert, denied*, 340 U.S. 917 (1951). See Shientag, *Cross-Examination—A Judge's Viewpoint*, 3 *The Record* 12, 19–20 (1948).

[48] As is well recognized, risk of confusion and hence judicial responsibility is greatest in conspiracy cases. See the opinion of Jackson, J., in Krulewitch v. United States, 336 U.S. 440, 445, 453 (1949).

[49] United States v. Gaunt, Crim. No. 18,201, D. Mass., Oct. 10, 1949, *modified and aff'd*, 184 F.2d 284 (1st Cir. 1950), *cert. denied*, 340 U.S. 917 (1951); United States v. Delaney, Cr. 51–294, 51–295 (D. Mass. 1952).

[50] Although there is no provision in the federal *criminal* rules for pre-trial, my own experience is that counsel in complicated cases often welcome pre-trial stipulations. In the scores of separate prosecutions for conspiracy to defraud the United States by false time-slips at the Bethlehem-Hingham yard which followed McGunnigal v. United States, 151 F.2d 162 1st Cir.), *cert. denied*, 326 U.S. 776 (1945), each defendant, who was tried separately, agreed to stipulate every underlying fact except his personal participation. This reduced the time of trial from over a week to less than half a day. And some of the defendants were, in my opinion, justifiably acquitted. Similar stipulations have been successful in Dyer Act conspiracies and conspiracies to violate the alcohol tax laws.

[51] Bihn v. United States, 328 U.S. 633 (1946).

[52] *But cf.* Frankfurter, J., concurring in Andres v. United States, 333 U.S. 740, 765 (1948): "The charge is that part of the whole trial which probably exercises the weightiest influence upon jurors. It should guide their understanding . . . ."

[53] GOODHART, ENGLISH CONTRIBUTIONS TO THE PHILOSOPHY OF LAW 14 (1949).

[54] Judge Lummus has given illuminating criteria for sentencing. LUMMUS, THE TRIAL JUDGE 42, 46, 54–55 (1937). See also ULMAN, A JUDGE TAKES THE STAND 234 (1936); Wortley, *The English Law of Punishment* in THE MODERN APPROACH TO CRIMINAL LAW, IV ENGLISH STUDIES IN CRIMINAL SCIENCE 50 (1945), and Radzinowicz, *The Assessment of Punishments by English Courts* in *id.* at 110.

[55] Williams v. New York, 337 U.S. 241 (1949).

[56] See ALLEN, DEMOCRACY AND THE INDIVIDUAL 67 (1943). For a contrary view see Chandler, *Latter-Day Procedures in the Sentencing and Treatment of Offenders in the Federal Courts* 16 FEDERAL PROBATION 3, 6; reprinted from VIRGINIA LAW REVIEW, October 1951.

[57] Williams v. New York, 337 U.S. 241, 247 (1949).

[58] *Id.* at 250.

[59] *Id.* at 247.

[60] A problem inherent in the federal system is whether there should be national equality of treatment. Those who sponsored the revised Federal Corrections Bill were mindful of the significance of a sentence in the area where the court sits as well as in the area where the defendant is imprisoned. See *Report of Committee on Punishment for Crime*, REP. ATT'Y GEN. 25, 26 (1942). See also SEN. REP. NOS. 894, 895, 78th Cong., 2d Sess. (1942); H. R. REP. NOS. 2139, 2140, 78th Cong., 2d Sess. (1942).

[61] COHEN, REASON AND LAW 56 (1950).

[62] Quotation of Philo in letter from Burke to Burgh cited in 2 L. STEPHEN, A HISTORY OF ENGLISH THOUGHT IN THE EIGHTEENTH CENTURY 226 (1881).

[63] It may be contended that the grounds for administrative action need be explicitly set forth only when judicial review is permissible, and as an aid to such review, and that since judicial review of the federal trial judge's sentencing discretion is unreviewable no grounds need be asserted. This is not a complete answer, for the trial judge's sentencing discretion is in effect reviewable by pardoning and commutation authorities.

[64] Quoted in 3 WIGMORE, EVIDENCE 151 (3d ed. 1940). But see Pound, *The Development of American Law and its Deviation from English Law*, 67 LAW QU. REV. 49, 50 first full paragraph; and "Duties of a Judge—Lord Justice Birkett's

Observations," THE TIMES (London) April 9, 1952. I am indebted to Mr. Justice Frankfurter for this last citation.

[66] Riverside Apt. Hotels, Inc. v. Rudnick, Civil No. 7823, D. Mass., Nov. 15, 1948.

[67] United States v. United Shoe Machinery Corp., Civil No. 7198, D. Mass., complaint filed Dec. 15, 1947.

[68] See, for example, my own course in National Fruit Product Co. v. Dwinell-Wright Co., 47 F. Supp. 499 (D. Mass. 1942), *aff'd*, 140 F.2d 618, 624 (1st Cir. 1944). Despite the affirmance, I now believe my conduct was contrary to the best standards.

[69] 208 U.S. 412 (1908).

[70] It may be needless to emphasize that the problem with which I am concerned is the formulation of a rule of law. Where a court is formulating a finding of fact it, of course, cannot rely on knowledge gained de hors the record, except in so far as it comes within the narrow ambit of the doctrine of judicial notice. *Cf.* West Ohio Gas Co. v. PUC, 294 U.S. 63, 70 (1935).

[71] *Cf.* Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930); Burns v. Twentieth Century-Fox Corp., 75 F. Supp. 986 (D. Mass. 1948).

[72] FULLER, THE PROBLEMS OF JURISPRUDENCE 707 (temp. ed. 1949). This reasoning may well apply to the appropriate treatment of novel arguments presented to a judge by his law clerk. It may be the responsibility of the judge to present those arguments to counsel for examination. *Cf. Experts As Consultants to Courts*, 74 N.J.L.J. 52 (1951). This is especially important because of the often unrecognized importance of those who are associates of the judge in his work. On this point consider the perceptive remark made by Bracton in CONCERNING THE LAWS AND CUSTOMS OF ENGLAND, bk. II, c. 16, f. 34 (1569), "qui habet socium, habet magistrum . . . ."

[73] In persuading an appellate tribunal, the virtue of orderliness, apart from any other grace, has long been recognized. *Cf.* Macmillian, *Law and Order* in LAW AND OTHER THINGS 21, 33 (1937). Simplicity of arrangement has been the only style that I have attempted in summarizing the facts in voluminous records. Standard Oil Co. v. Markham, 64 F. Supp. 656 (S.D.N.Y. 1945), *modified and aff'd*, 163 F.2d 917 (2d Cir. 1947); United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950); Ashley v. Keith Oil Corp., 73 F. Supp. 37 (D. Mass. 1947); Tribble v. J. W. Greer Co., 83 F. Supp. 1015 (D. Mass. 1949).

[74] See LUMMUS, THE TRIAL JUDGE 27–37 (1937).

[75] I, for example, have a feeling that I am near enough to the recent immigrant to have some understanding of his problem. Rudenberg v. Clark, 72 F. Supp. 381 (D. Mass. 1947), *modified and aff'd*, 81 F. Supp. 42 (D. Mass. 1948); Petition of Forte, 84 F. Supp. 738 (D. Mass. 1949).

[76] ELIOT, THE USE OF POETRY AND THE USE OF CRITICISM 59 (1933).

[77] *E.g.*, 28 U.S.C. §§ 2281–82 (Supp. 1951). These considerations dictated my doubtful opinions in United States v. Slobodkin, 48 F. Supp. 913 (D. Mass.), *aff'd sub nom.* United States v. Rottenberg Co., 137 F.2d 850 (1st Cir. 1943), *aff'd sub nom.* Yakus v. United States, 321 U.S. 414 (1944); United States v. Alexander Wool Combing Co., 66 F. Supp. 389 (D. Mass. 1946), *aff'd*, 160 F.2d 103 (1st Cir. 1947), *aff'd sub nom.* Lichter v. United States, 334 U.S. 742 (1948).

[78] See Sutherland, J., dissenting in West Coast Hotel Co. v. Parrish, 300 U.S. 379, 401–02 (1937).

[79] *Cf.* Parker, J., in Barnette v. West Va. State Bd. of Educ., 47 F. Supp. 251,

252–53 (S.D. W. Va., 1942), *aff'd*, 319 U.S. 624 (1943); Woodbury, J., dissenting in United States v. Girouard, 149 F.2d 760, 767 (1st Cir. 1945).

[79] *Cf.* L. Hand, J., dissenting in Spector Motor Serv. v. Walsh, 139 F.2d 809, 823 (2d Cir. 1943).

[80] Brown & Sharpe Mfg. Co., v. Kar Engineering Co., 59 F. Supp. 820 (D. Mass. 1945), *rev'd*, 154 F.2d 48 (1st Cir.), *cert. denied*, 328 U.S. 869 (1946); Ashley v. Keith Oil Corp., 73 F. Supp. 37, 52–43 (D. Mass. 1947). But see United States v. Spencer, 65 F. Supp. 763 (D. Mass. 1946), *rev'd sub nom.* Massachusetts v. United States, 160 F.2d 614 (1st Cir. 1947), *aff'd*, 333 U.S. 611 (1948); United States v. Currier Lumber Co., 70 F. Supp. 219 (D. Mass. 1947), *aff'd*, 166 F.2d 346 (1st Cir. 1948).

[81] SHAKESPEARE, TROILUS AND CRESSIDA, ACT I, Scene 3, Line 86.

[82] *Cf.* Armao v. Gahagan Construction Corp., Civil No. 4280, D. Mass., April 17, 1947, *aff'd*, 165 F.2d 301, 304 (1st Cir. 1948), *cert. denied*, 333 U. S. 876 (1948); *In re* MacKenzie Coach Lines, Inc., 100 F. Supp. 489 (D. Mass. 1951), *aff'd sub nom.* Nathanson v. NLRB, 193 F.2d 000 (1st Cir. 1952).

[83] 304 U.S. 64 (1938). *Cf* Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L. J. 267 (1946).

[84] 60 STAT. 441, 15 U.S.C. §§ 1126 (b), (h), (i) (1946). See Recent Case, 64 HARV. L. REV. 1209 (1951).

[85] 16 Pet. 1 (U.S. 1842).

[86] Prior to the enactment of MASS. ANN. LAWS c. 110, § 7A (Supp. 1950), the District Court in Massachusetts took a narrow view of the Massachusetts state law of unfair competition. See Triangle Publications, Inc. v. New England Newspaper Pub. Co., 46 F. Supp. 198, 203 (D. Mass. 1942); National Fruit Product Co. v. Dwinell-Wright Co., 47 F. Supp. 499, 509 (D. Mass. 1942), *aff'd*, 140 F.2d 618 (1st Cir. 1944). After the enactment of this statute, the federal cases take a more liberal view of the state law. See Food Fair Stores, Inc. v. Food Fair, Inc., 83 F. Supp. 445, 450 (D. Mass. 1948), *aff'd*, 177 F.2d 177 (1st Cir. 1949).

[87] Pomerantz v. Clark, 101 F. Supp. 341 (D. Mass. 1951).

[88] Ashley v. Keith Oil Co., 73 F. Supp. 37, 54–57 (D. Mass. 1947). For a more recent case in which the Federal Court interpreted State decisions with some freedom, See *Duncan Shaw Corp. et al* v. *Standard Machinery Co. et al* 1st cir., No. 4615, Apr. 22, 1952.

[89] 217 N.Y. 382, 111 N.E. 1050 (1916). I have been authoritatively told that this case was initially assigned by the Chief Judge of the Court of Appeals to a judge who did not see the possibilities of evolving a new rule of law.

[90] 233 N.Y. 236, 135 N.E. 275 (1922).

[91] 248 N.Y. 339, 162 N.E. 99 (1928).

[92] *Independence of Judges: Should They Be Used for Non-Judicial Work?*, 33 A.B.A.J. 792 (1947).

[93] *Cf.* Hart, *Holmes' Positivism—An Addendum*, 64 HARV. L. REV. 929, 934 (1951); Goodhart, *Some American Interpretations of Law* in MODERN THEORIES OF LAW 1, 9, 15, 17 (1933).

[94] Cohen, *The Process of Judicial Legislation* in LAW AND THE SOCIAL ORDER 112, 128 (1933):

"It is characteristic of the prevailing rationalistic systems of legal philosophy that they minimize the importance of procedure by calling it adjective law, etc. But the tendency of all modern scientific and philosophic thought is to weaken the

distinction between substance and attribute . . . and to emphasize the importance of method, process, or procedure."

[95] 1 WIGMORE, EVIDENCE § 8 (3d ed. 1940). See HALÉVY, THE GROWTH OF PHILOSOPHIC RADICALISM 385, 388–94 (1949).

[96] United States v. United Shoe Machinery Corp., 89 F. Supp. 349 (D. Mass. 1950).

[97] Slifka v. Johnson, 161 F.2d 467 (2d Cir. 1947). See the opinions of A. N. Hand, J., at 469 and Frank, J., at 470.

[98] *Cf.* FED. R. CIV. P. 61; FRED. R. CRIM. P. 52 (a); 28 U.S.C. § 2111 (Supp. 1951).

[99] Frankfurther, J. dissenting in Dice v. Akron, C. & Y.R.R., 342 U.S. 359, 362, 72 Sup. Ct. 312 (1952), citing Union Pac. Ry. v. Harris, 158 U.S. 326 (1895).

[100] Schneiderman v. United States, 320 U.S. 118, 125 (1943).

[101] *Cf.* POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 114 (1922).

[102] Cohen, *Rule Versus Discretion* in LAW AND THE SOCIAL ORDER 264 (1933): "Discretion, in general, represents more or less instinctive evaluation or appreciation of the diverse elements that enter into a complex; and such instinctive evaluation must precede conscious rule-making."

[103] This progression can be neatly traced in the labor field by studying the development of remedies originally prescribed by Hutcheson, J., in Brotherhood of Ry. and S.S. Clerks v. Texas & N.O.R.R., 24 F.2d 426, 434 (S.D. Tex.), *injunction made permanent*, 25 F.2d 873, 876 (S.D. Tex. 1928), *aff'd*, 33 F.2d 13 (5th Cir. 1929), *aff'd*, 281 U.S. 548 (1930), and later embodied in the Railway Labor Act and the National Labor Relations Act. Or consider the types of remedies in antitrust cases. *Compare* Hartford-Empire Co. v. United States, 323 U.S. 386, *modified*, 324 U.S. 570 (1945), *with* United States v. National Lead Co., 332 U.S. 319 (1947), and compare the latter case with United States v. United States Gypsum Co., 340 U.S. 76 (1950). See also *Besser Mfg. Co. et al* v. *U.S.*, Sup. Ct of U.S., Oct. Term 1951, No. 230, May 26, 1952.

[104] The common law historically is founded on remedies. *Cf* 2 MAITLAND, COLLECTED PAPERS 110 (Fisher ed. 1911): "Legal Remedies, Legal Procedure, these are the all-important topics for the student." No doubt most litigants would agree that they too regard the remedy as the all-important topic. And so would many jurists. See citations by Frank, J., in United States v. Obermeier, 186 F.2d 243, 255 n.52 (2d Cir. 1950).

[105] *Cf.* Jaeger, *Praise of Law* in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 352, 360–61 (Sayre ed. 1947).

[106] Rheinstein, *Who Watches The Watchmen?* in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 589, 602–03 (Sayre ed. 1947):
"The judicial process is not an automatic one, . . . it contains an inevitable element of creative activity . . . It is . . . [the] articulation of a pre-existing standard, a standard pre-existing in the unexpressed and inarticulated value consciousness of the community."

# Draw Near and Give Attention

by Lester E. Denonn

"Sumer is icumen in" and there will be days when the fish won't be biting, when the week end guests have gone, when the good partner has taken the car into town to shop for the children—and maybe for herself—and when the children will be still tucked away happily in camp. What then for you between draughts of the trusty meerchaum—or will it be the stained corncob to match your rustic tieless and short sleeved shirt? There are two answers you can store away for just such a moment, answers which while not entirely removed from shop, will be sufficiently entrancing to keep your thoughts engaged in calmly contemplating the underlying purport of your profession with all its glamor, pathos and profusion, and yet keep you above the daily routine you have fled. These two answers can be found in the words of two of our judges, whose books have appeared within the month, an event of sufficient significance to warrant The Record's more than passing notice.[1]

A layman, Irving Dilliard, of the St. Louis Post-Dispatch, a former Nieman fellow, has done yeoman service to lawyers and the laity by collecting thirty-four papers and addresses of Judge Learned Hand, from his class-day oration of 1893 to his recent review of his underlying faith in his 1952 address at the Harvard Club, entitled "At Fourscore." The volume bears the revealing title, "The Spirit of Liberty," taken from his short classic, delivered in Central Park on "I am an American Day," in 1944, when he said in words already set in anthologies and burned in the hearts of Americans:

> What then is the spirit of liberty? I cannot define it; I can only tell you my own faith. The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias; the spirit of liberty remembers that not even a sparrow falls to earth unheeded; the spirit of liberty is the spirit of Him who near two thousand years ago, taught mankind that lesson it has never learned, but has never forgotten; that there may be a kingdom where the least shall be heard and considered side by side with the greatest.

In this short, inspiring volume will be found eloquent appraisals leading judges of the twentieth century: Holmes, Cardozo, Brandeis, Stone, Hughes and Swan, as well as insight into Judge Hand's own lucid lucubrations on tolerance, democracy, liberty, the function of a judge and the contribution

[1] *The Spirit of Liberty*. Papers and Addresses of Learned Hand. Collected, and with an Introduction and Notes, by Irving Dilliard. New York, Alfred A. Knopf. 1952. 262 pp. $3.50. *Trial Judge*. The Candid Behind-the-Bench Story of Justice Bernard Botein. New York, Simon and Schuster. 1952. 337 pp. $5.00.

of an independent judiciary, all with a humanistic foundation in the Greek tradition.

Learned Hand remains as one of the few surviving, potent voices, nurtured in the Harvard of the 1890's under such varied, stimulating minds as James, Royce, Santayana, Palmer and Münsterberg. "For myself I learned (in the halls of Harvard) and took away the creed that I have just tried to describe, a creed which has endured and whose conviction has grown upon me as the years have past. You were not taught it in words; you gathered it unwittingly from uncorrupted and incorruptible masters."

Among these masters, one stood out and fashioned for us another exemplar of the pragmatic approach-and when we measure the contributions of Hand in the forty years of vibrant decisions, we can conclude that that approach is not so deleterious as some of its critics would hold. Judge Hand is ready to acknowledge his indebtedness to that master in words memorable for that reason and for their bearing upon our current reflections about liberty:

> We shall not succeed by any attempt to put old wine in new bottles; liberty is an essence so volatile that it will escape any vial however corked. It rests in the hearts of men, in the belief that knowledge is hard to get, that man must break through again and again the thin crust on which he walks, that the certainties of today may become the superstitions of tomorrow; that we have no warrant of assurance save by everlasting readiness to test and test again. William James was its great American apostle in modern times; we shall do well to remember him.

We shall indeed to well to remember him and also the words of the pupil who learned and exemplified the lesson so ably in a significant life time. The volume under review will stand as a memorable source for understanding that man, his mind and his aspirations for mankind, even as the comparable volumes of the speeches of another of his masters, Justice Holmes.

Far different, but equally absorbing are the reflections of Justice Botein upon his ten years as a Justice of our New York Supreme Court. "Trial Judge," written primarily as an exposition for laymen, is nevertheless a revelation for even the most active practitioner. We are brought face to face with the many and varied duties of a Justice that far transcend what we see and hear at trial and special term and in motion parts. The many hours spent in chambers and in the library reading and studying affidavits and briefs and preparing to meet the challenges of the problems of the law to be faced on the morrow and to frame the charge that will be made to the twelve jurors and that likewise may be wrestled with by the twelve judges who may at later times pass upon its adequacy, are all pictured vividly with snatches of a judge at work and illustrated by lively examples from his daily experiences. But more unusual in import and of surprising scope, save to those initiated into all facets of the judge's work, are the days spent on commitment cases in the court room at Bellevue Hospital and the hours given in

chambers with a view to settling that most dramatic and far reaching problem of the welfare and custody of the child in matrimonial cases.

Many of these are "things not taught in law school." Judge Botein also reviews many of the ever current problems of administration: the calendar lag particularly in jury tort cases, the efficacy of settlement and pretrial conferences, the salutary contribution of the jury to even-handed, common sense justice, the difficulties attendant upon fact finding in the court room, the characteristics of our adversary type of court procedure, the use and abuse of experts, the art of cross examination, the troublesome nature of jury duty excuses, and the occasional direct and indirect attempts at influencing the decisions of the judge. These and many more problems crowd these pages and make them of interest to lawyer and layman alike.

As you pause to refill your pipe with either volume at hand, you can reflect in admiration upon the work of Judge Hand and Justice Botein in the concluding words of the latter: "The standards of success in the judiciary are largely self-imposed, dependent upon the conscience and capability of the individual judge."

# Review of Recent Decisions of the United States Supreme Court

By Joseph Barbash and Robert B. von Mehren

## BEAUHARNAIS V. ILLINOIS

*(April 28, 1952)*

Petitioner Beauharnais was tried to a jury in the Chicago Municipal Court on an information charging that he "did unlawfully . . . . exhibit in public places lithographs, which publications portray depravity, criminality, unchastity or lack of virtue of citizens of Illinois of the Negro race and color and which exposes [sic] citizens of Negro race and color to contempt, derision or obloquy" in violation of an Illinois statute cast in the same terms. The lithograph involved was a leaflet purporting to be a petition calling on Chicago city officials "to halt the further enroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro." It summoned the white people of Chicago to unite and warned: "If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . . rapes, robberies, knives, guns and marijuana of the negro, surely will."

The only issue left by the trial court to the jury was whether Beauharnais had exhibited the lithograph in a public place. The court refused to charge the jury that it must first find "that the article complained of was likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest."

Beauharnais was convicted and fined $200. The Illinois Supreme Court affirmed his conviction, rejecting his contentions that the statute violated the Due Process Clause of the Fourteenth Amendment in that (1) it was too vague; and (2) it restricted his guaranteed freedom of speech and of the press. 408 Ill. 512 (1951). In an opinion by Mr. Justice Frankfurter, the Supreme Court of the United States affirmed, Justices Black, Reed, Douglas and Jackson dissenting in separate opinions.

The basic premise of Mr. Justice Frankfurter's opinion is that Beauharnais was convicted under a "criminal libel" statute differing from ordinary criminal libel statutes only in that the libel was directed against a group rather than against an individual. From this premise, the majority believes, it follows that the statute is not unconstitutionally vague: Illinois used "a form of words which invoked the familiar common law of libel to define the prohibited utterances." From the same premise it follows that freedom of speech and freedom of the press are not involved. These freedoms do not

protect libel against an individual, and if the particular utterance directed against an individual can be criminally punished,

> "we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this is a wilful and purposeless restriction unrelated to the peace and well-being of the State."

The majority found that the State could believe that its "peace and well-being" were involved because of its experience of bloody race-riots, and, apparently, because "a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willynilly belongs, as it does on his own merits."

Mr. Justice Black, joined by Mr. Justice Douglas, dissented on the ground that

(1) "Beauharnais and his group were making a genuine effort to petition their elected representatives," and consequently their action is protected by the First Amendment, as made applicable to the states by the Fourteenth; and

(2) The majority's analogy of group libel to libel of an individual is a dangerous expansion: To call this a form of criminal libel law is simply "sugarcoating it," and "no rationalization on a purely legal level can conceal the fact that state laws like this one present a constant overhanging threat to freedom of speech, press and religion."

Mr. Justice Reed, also joined by Mr. Justice Douglas, dissented on the ground that the statute and the information drawn under it were unconstitutionally vague. He disagreed that the words "virtue," "derision" and "obloquy" were given a "sufficiently clear and narrow meaning" by the Illinois Court when it characterized the statute as "a form of criminal libel law." He noted that there had been no Illinois cases cited either by the Supreme Court of Illinois or by the majority which gave these words any "clarifying construction."

Mr. Justice Douglas not only joined Justices Black and Reed, but also dissented separately. He stated that the case was governed by the First Amendment, which can only be overridden by other public interests when "the peril of speech . . [is] . . clear and present, leaving no room for argument, raising no doubts as to the necessity of curbing speech in order to prevent disaster."

In his dissent Mr. Justice Jackson agreed with the majority that the states had the power to bring "classes 'of any race, color, creed, or religion' within the protection of its libel laws." But criminal libel laws, whether individual or group, "are consistent with the concept of ordered liberty only when applied with safeguards evolved to prevent their invasion of freedom

of expression," and these safeguards, he concluded, had been denied Beauharnais.

Mr. Justice Jackson found first that, contrary to the majority's determination, the trial court had prevented Beauharnais from proving the Illinois defense of truth and good motives. Second, neither the court nor the jury had passed on whether the lithograph was a petition for redress of grievances and thus privileged. Finally, the only finding by court or jury concerning probable injury was the opinion of the Illinois Supreme Court that the words used had, as an abstract matter, a "tendency to cause a breach of the peace." This was not enough, for "punishment of printed words, based on their *tendency* either to cause breach of the peace or injury to persons or groups, in my opinion, is justifiable only if the prosecution survives the 'clear and present danger' test."

## ZORACH ET AL. V. CLAUSON ET AL.

*(April 28, 1952)*

In *Everson* v. *Board of Education,* 330 U.S. 1 (1947), the Supreme Court held, in a 5–4 decision, that a New Jersey statute which permitted the reimbursement of parents for fares paid for the transportation of children to and from Catholic schools did not make the "slightest breach" in the wall erected between Church and State by the First Amendment. In *McCollum* v. *Board of Education,* 333 U.S. 203 (1948), the Court held, in an 8–1 decision, that the Illinois "released time" program under which children, compelled by law to go to public schools, were freed from some hours of required school work to attend special religious classes conducted in the school buildings, breached the wall and violated the First Amendment. In *Zorach et al.* v. *Clauson et al.* (April 28, 1952), the Supreme Court considered the New York City "released time" program, a program which differed from the Illinois program condemned in the *McCollum* case only in one important respect—that the religious instruction was not given in the school buildings.

In New York City school authorities permit students, on the written request of parents, to leave the school during the school day to go to religious centers for religious instruction or devotional exercises. Students who are not released must stay in the classrooms. Attendance reports are made to the schools by the churches giving the religious instruction. Mr. Justice Douglas, joined by the Chief Justice and Justices Reed, Burton, Clark and Minton, held that the New York City program does not violate the First Amendment. This conclusion was reached by distinguishing the *McCollum* case on the ground that the New York " 'released time' program involves neither religious instruction in public school classrooms nor the expenditure of public funds" and by holding that public schools can make the New York City ad-

justment "of their schedules to accommodate the religious needs of the people."

Mr. Justice Black, who had written the Court's opinion in the *McCollum* case, filed a dissent in which he argued that that decision required the invalidation of the New York system:

> "I see no significant difference between the invalid Illinois system and that of New York here sustained. Except for the use of the school buildings in Illinois, there is no difference between the systems which I consider even worthy of mention. . . . As we attempted to make categorically clear, the *McCollum* decision would have been the same if the religious classes had not been held in the school buildings . . . . *McCollum* thus held that Illinois could not constitutionally manipulate the compelled classroom hours of its compulsory school machinery so as to channel children into sectarian classes. Yet that is exactly what the Court holds New York can do."

Mr. Justice Frankfurter, also dissenting, suggested that the First Amendment would not be violated if the schools should dismiss all pupils early on fixed days rather than releasing some for religious instruction:

> ". . . The essence of this case is that the school system did not 'close its doors' and did not 'suspend its operations.' There is all the difference in the world between letting the children out of school and letting some of them out of school into religious classes. If every one is free to make what use he will of time wholly unconnected from schooling required by law . . . then of course there is no conflict with the Fourteenth Amendment."

Mr. Justice Jackson was the third dissenter. He stated his position with brevity and clarity:

> "This released time program is founded upon a use of the State's power of coercion, which, for me, determines its unconstitutionality. Stripped to its essentials, the plan has two stages, first, that the State compel each student to yield a large part of his time for public secular education and, second, that some of it be 'released' to him on condition that he devote it to sectarian religious purposes."

He concluded by belittling the majority's distinction of the *McCollum* case:

> "*. . . The distinction attempted between that case and this is trivial, almost to the point of cynicism, magnifying its nonessential details and disparaging compulsion which was the underlying reason for invalidity.* A reading of the Court's opinion in that case along with its opinion in this case will show such difference of overtones and under-

tones as to make clear that the *McCollum* case has passed like a storm in a teacup. The wall which the Court was professing to erect between Church and State has become even more warped and twisted than I expected. Today's judgment will be more interesting to students of psychology and of the judicial processes than to students of constitutional law." (Ital. added.)

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In all candor, it must be conceded that Justice Jackson's characterization of the majority's attempted distinction between the *McCollum* case and the instant case is correct. The Court's opinion in the *McCollum* case stated:

> "Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State." 333 U.S. at 212.

Justice Reed in his dissent in the *McCollum* case indicated his understanding of his colleagues' conclusion to be as follows:

> "From the tenor of the opinions I conclude that their teachings are that any use of a pupil's school time, whether that use is on or off the school grounds, with the necessary school regulations to facilitate attendance, falls under the ban. . . ." 333 U.S. at 240.

Although expressly stating that it "follow[s] the McCollum case," the majority in *Zorach* stated that:

> ". . . There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the 'free exercise' of religion and an 'establishment' of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. *The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. . . .*" (Ital. added.)

The extent to which this is a retreat from the position taken by the Court in the *McCollum* case is shown by the following excerpt from that case:

> ". . . For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the *Everson* case, the First Amendment has erected a wall be-

tween Church and State which must be kept high and impregnable." 333 U.S. at 212.

The Court's approach in the *Zorach* case is, it would seem, an adoption of Justice Reed's in the *McCollum* case, *i.e.* that the constitutional question is not whether a wall between Church and State has been breached but whether there has been an interference with "free exercise" of religion or an "establishment" of religion. Whatever the basic merits of the Court's new position, once taken it would have been more forthright and useful to have overruled *McCollum* and to have made a new start, rather than to have done as was done—to reach a decision inconsistent with *McCollum* and still to give lip service to that opinion.

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